

Testimony of Anne Tindall Prepared for the Record

“Strengthening Congressional Oversight Capacity”

House Select Committee on the Modernization of Congress

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Chairman Kilmer, Vice Chairman Timmons, Members of the Select Committee, thank you for the opportunity to testify at this important and timely hearing.

I serve as counsel at Protect Democracy, a nonprofit working to prevent and respond to actions that undermine our democratic system. We are thus acutely concerned with preventing abuses of executive power.

A key component of that effort is ensuring Congress functions as an effective check on the Executive Branch. That is why Protect Democracy has led a cross-ideological coalition to support the Protecting Our Democracy Act, which includes provisions to strengthen lawmakers’ ability to secure documents and testimony and reassert Congress’s power of the purse, among other provisions focused on reclaiming Congress’s Article I responsibilities and authorities.¹

Congress’s oversight authorities have been under assault for some time. Although the Trump White House took the practice of refusing to comply with congressional inquiries farther than any prior administration,² Administrations of both parties frequently have refused to accommodate congressional requests for information in good faith and worked to undermine Congress’s institutional authority to enforce those requests. But the Executive Branch is not solely to blame for the forces impeding legislative oversight. Congress, too, shares much of the responsibility for the abdication of authorities and underinvestment in oversight capacity.

Today, I would like to cover three general areas of concern regarding opportunities for strengthening congressional oversight capacity: mechanisms for securing information from the Executive branch, including options for modernizing Congress’s subpoena compliance and enforcement tools; consideration of a congressional Office of Legal Counsel, akin to the Justice Department’s Office of Legal Counsel; and more efficient and appropriate access to sensitive material by congressional staff.

The weakening of critical oversight mechanisms have steadily diminished Congress’s leverage over the Executive Branch, leaving congressional oversight to happen largely on the President’s

¹ Protecting Our Democracy Act, H.R. 5314, 117th Cong., tits. IV, V (2021).

² See, e.g., Charlie Savage, *Trump Vows Stonewall of ‘All’ House Subpoenas, Setting Up Fight Over Powers*, N.Y. Times (Apr. 24, 2019), <https://www.nytimes.com/2019/04/24/us/politics/donald-trump-subpoenas.html>.

terms. This state of affairs undermines our constitutionally mandated system of checks and balances. Protect Democracy therefore views the strengthening of Congress's oversight capacity as essential to the health and survival of our democratic system.

Securing Information

As Members of this committee know all too well, it is often precisely when the Executive Branch is least likely to accommodate congressional requests that Congress is most in need of information. Lawmakers rely not just on the use of subpoenas, but on the credible threat of subpoena enforcement, to compel cooperation with requests for records and testimony from a reluctant Executive Branch.

Traditionally, lawmakers have turned to robust enforcement options when necessary, including Congress's inherent contempt power and a statutory contempt procedure. Because these enforcement tools generated political and material costs to noncompliance with congressional requests, they served as effective incentives during negotiations with their executive counterparts, encouraging officials to accommodate congressional access to pertinent information in good faith. This is by and large no longer the case. As Congress's inherent contempt power fell into disuse, and the Justice Department declined to prosecute executive officials for contempt of Congress as a matter of institutional policy, both enforcement options became largely symbolic. The declining power of these two tools has led Congress in recent years to pursue a third option—civil enforcement of its subpoenas through the courts—which has proven to be neither timely nor effective.

Although Congress currently struggles to enforce its subpoenas against the Executive Branch, this is not because it lacks the power to do so. Congress has at its disposal a robust constitutional toolbox to compel cooperation with its requests, but those tools are in need of reform.

As I outline in greater detail below, Congress should strengthen its enforcement mechanisms within each of the three frameworks for securing compliance: enforcement through its inherent contempt power, through federal law enforcement, and through the courts. Specifically, the Select Committee should consider proposals to modernize Congress's inherent contempt power by levying fines instead of deploying the sergeants-at-arms to detain contemnors; establish a cause of action that expressly provides for the civil enforcement of House subpoenas; and expedite judicial proceedings in the event that disputes over congressional subpoenas reach the courts.

The Select Committee also should move forward with its prior recommendation to have the Government Accountability Office (GAO) examine the viability of a Congressional Office of Legal Counsel. That office could serve as a counterweight to the Justice Department's Office of

Legal Counsel (OLC), the opinions of which outline the legal basis for the Executive Branch’s noncompliance with certain congressional requests and the Justice Department’s refusal to enforce certain legislative subpoenas through the statutory contempt process. Creating a single office to articulate Congress’s institutional prerogatives, and to issue opinions that respond to the OLC positions often cited by the Executive Branch, could help strengthen Congress’s hand in oversight disputes.

Finally, to minimize the informational disadvantage Congress confronts in its oversight of executive operations, especially defense and national security programs, the Select Committee should consider reforms to increase the number of congressional staff with access to Top Secret/Sensitive Compartmented Information (TS/SCI) security clearances, along with adopting a number of the excellent proposals regarding staff capacity, training, compensation, and technology included in the Select Committee’s recommendations in the 116th Congress.³ At a minimum, the Committee should recommend that the House pass a resolution allowing each member of the House Permanent Select Committee on Intelligence to hire a personal staffer with a TS/SCI clearance, as their Senate counterparts may. But more broadly, the Committee should consider the viability of allowing every member of Congress to designate one personal office staffer to be cleared at the TS/SCI level. This would help ensure that members of Congress have the staff support they need to understand and effectively oversee some of the federal government’s most sensitive and consequential programs.

1. Subpoena Compliance and Enforcement

Before examining proposals to strengthen Congress’s subpoena compliance and enforcement tools, it is worth dissecting the flaws in the current inherent and statutory contempt processes and why civil litigation has proved to be an ineffective alternative.

Congress’s inherent contempt power enables either chamber to punish nonmembers for obstructing its work. Historically, Congress did so by deploying the sergeants-at-arms to arrest those individuals.⁴ Although the Supreme Court has repeatedly upheld the constitutionality of inherent contempt and its enforcement,⁵ neither chamber has exercised that power and tried a

³ Select Comm. on Modernization of Cong., *116th Congress Recommendations*, <https://tinyurl.com/m4zv8hns>.

⁴ Following an arrest, the sergeant-at-arms brought the contemnor before the House or the Senate where the individual was tried before the bar of the body; and the entire chamber sat for the testimony at trial, after which lawmakers voted to adopt a resolution adjudicating the guilt of the individual. If convicted, the contemnor would be imprisoned or otherwise sanctioned; the resolution affirming the contemnor’s guilt specifies his punishment. Cong. Rsch. Serv., RL34097, *Congress’s Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure* 10-11 (2017), <https://tinyurl.com/4ryvymtb>; Rex Lee, *Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 B.Y.U. L. Rev. 231, 253-54 (1978); see also *Anderson v. Dunn*, 19 U.S. 204 (1821) (upholding House’s exercise of inherent contempt, outlining arrest and trial procedures for contemnor).

⁵ *Anderson*, 19 U.S. 204; *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927) (“[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.”).

contemnor before the bar of Congress since 1945.⁶ This was largely due to the cumbersome nature of the process, which Congress itself has described as “time consuming,” and also given the availability of a statutory contempt procedure as a practical alternative for lawmakers, which had since 1857 served as complement to inherent contempt.⁷

In recent decades, OLC has argued that Congress may not use the inherent contempt power to compel the testimony of Executive Branch officials who decline to cooperate because they are complying with an assertion of executive privilege or a presidential directive not to testify.⁸ By not contesting these arguments in practice, Congress has, in effect, acquiesced to them.

Congress’s second enforcement option—statutory contempt—is also today largely ineffective. Congress passed the criminal contempt statute in 1857 as a complement to its inherent contempt authority, which refers contempt citations to a U.S. attorney for prosecution.⁹ These referrals and the threat of prosecution historically served as effective means of encouraging cooperation with congressional requests, including among senior government officials.¹⁰ Indeed, the historical record is clear that Congress intended the statute be used to compel compliance among executive officials. But since the 1980s, the Justice Department has abandoned its obligation to enforce contempt citations when they implicate Executive Branch officials.¹¹ For instance, in 2008, the House issued criminal contempt citations for Harriet Miers, President Bush’s former White House Counsel, and Joshua Bolten, Bush’s White House Chief of Staff, for refusing to comply with House Judiciary Committee subpoenas to testify and produce documents in an investigation

⁶ S. Rep. No. 95-170, at 97 (1977), <https://www.ojp.gov/pdffiles1/Digitization/63796NCJRS.pdf>.

⁷ *Id.*; Cong. Rsch. Serv., *Congress’s Contempt Power and the Enforcement of Congressional Subpoenas*, *supra*, at 12; Lee, *supra*, at 254.

⁸ Prosecution for Contempt of Cong. of Exec. Branch Official Who Has Asserted a Claim of Exec. Privilege, 8 Op. O.L.C. 101, 131 (1984); Testimonial Immunity Before Cong. of the Former Counsel to the President, 43 Op. O.L.C., slip op. at 20-21 (2019), <https://www.justice.gov/olc/opinion/file/1215066/download>.

⁹ 2 U.S.C. §§ 192, 194.

¹⁰ From 1975 to 1988, “there were 10 votes to hold cabinet-level executive officials in contempt. All resulted in complete or substantial compliance with the information demands in question before the necessity of a criminal trial.” Morton Rosenberg & William J. Murphy, Good Gov’t Now, *The Case for Direct Appointment by the House of Outside Counsel to Prosecute Citations of Criminal Contempt of Executive Branch Officials* 35 (Dec. 5, 2019), <https://tinyurl.com/hdpdz83p>. In at least some of these cases, “[t]here is evidence... that the contemnors were reluctant to risk a criminal prosecution to vindicate a presidential claim of privilege or policy, which led to settlements.” *Id.*

¹¹ See, e.g., Prosecution for Contempt of Cong., 8 Op. O.L.C. 101; Dan Eggen & Amy Goldstein, *Fight Over Documents May Favor Bush, Experts Say*, Wash. Post (July 21, 2007), <https://tinyurl.com/t8v3j78s> (The Clinton administration “contended, as the Bush administration did this week, that Congress has no power to force a U.S. attorney to pursue contempt charges in cases in which a president has invoked executive privilege to withhold documents or testimony.”); Nicholas Fandos, *House Holds Barr and Ross in Contempt Over Census Dispute*, N.Y. Times (July 17, 2019), <https://www.nytimes.com/2019/07/17/us/politics/barr-ross-contempt-vote.html> (“There is no real risk the department will pursue” Congress’s criminal contempt charges against Attorney General William Barr and Commerce Secretary Wilbur Ross.); Todd Garvey, Cong. Rsch. Serv., R45653, *Congressional Subpoenas: Enforcing Executive Branch Compliance* 3 (2019), <https://crsreports.congress.gov/product/pdf/R/R45653> (“Four times since 2008, the House of Representatives has held an executive branch official (or former official) in criminal contempt of Congress for denying a committee information subpoenaed during an ongoing investigation. In each instance the executive branch determined not to bring the matter before a grand jury.”).

into the firing of several U.S. Attorneys.¹² The criminal contempt statute directs congressional citations to be referred “to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.”¹³ But the Justice Department, first under Bush and then under President Obama, declined to impanel a grand jury to consider the contempt citations. Instead, the department relied on more than three decades of OLC opinions to justify its refusal to enforce the law.¹⁴

The Justice Department’s declinations to prosecute Executive Branch officials for contempt of Congress—a federal crime—and lawmakers’ decisions not to resort to the vestigial process of inherent contempt in its place, have forced the legislature to use an alternative and historically novel means to enforce its subpoenas against executive officials: judicial enforcement. However, the resulting lawsuits have neither proceeded quickly nor gone especially well for Congress.

Congress filed a civil action to enforce a subpoena against the Executive Branch for the first time in 1973.¹⁵ The courts swiftly ruled for the Executive Branch.¹⁶ Congress did not initiate a second civil suit for more than three decades.

The House Judiciary Committee’s 2008 effort to enforce its subpoena for the testimony of Harriet Miers, President Bush’s former White House Counsel, kicked off the current period in which civil litigation has become the default method of attempting to compel compliance with congressional subpoenas.¹⁷ That lawsuit and subsequent litigation point to at least three overarching challenges hampering civil enforcement. First, the slow pace of litigation prevents Congress from gaining expedient access to the documents and testimony it needs.¹⁸ Second,

¹² H. Res. 979, 110th Cong. (2008).

¹³ 2 U.S.C. § 194.

¹⁴ See Whether Dep’t of Just. May Prosecute White House Offs. for Contempt of Cong., 32 Op. O.L.C. 65 (2008), <https://www.justice.gov/opinion/file/832851/download>.

¹⁵ R.W. Apple, Jr., *Nixon Contests Subpoenas, Keeps Tapes; Hearing Set Aug. 7 on Historic Challenge*, N.Y. Times (July 27, 1973), <https://tinyurl.com/4sd9t4vy>; *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 370 F. Supp. 521 (D.D.C. 1974).

¹⁶ *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (affirming district court’s dismissal of committee’s lawsuit).

¹⁷ See *Committee on Judiciary v. Miers*, 542 F.3d 909 (D.C. Cir. 2008).

¹⁸ In *Committee on the Judiciary v. Miers*, 542 F.3d 909, the dispute between Congress and the Executive Branch was resolved more than two years after the House issued the subpoena for Miers’s testimony, when both a new President was in office and a new Congress was in session. *Miers, Rove Will Testify to Judiciary*, Politico (Mar. 5, 2009), <https://www.politico.com/story/2009/03/miers-rove-will-testify-to-judiciary-019644>. Similarly, the House Judiciary Committee’s effort to secure the testimony of former White House Counsel Don McGahn concluded after almost two years of litigation, and only once a new President had taken office and a new Congress was in session. Ann Marimow, *Biden Administration, House Democrats Reach Agreement in Donald McGahn Subpoena Lawsuit*, Wash. Post (May 11, 2021), <https://tinyurl.com/7z39n8fn>. These timelines are relatively short compared to the duration of other subpoena enforcement fights. For instance, it took the House Oversight and Reform Committee and the Justice Department seven years of litigation to resolve their dispute over the committee’s effort to obtain access to records related to the “Fast and Furious” Operation. Josh Gerstein, *Subpoena Fight Over Operation Fast and Furious Documents Finally Settled*, Politico (May 9, 2019), <https://tinyurl.com/w47y5r83>.

unlike the Senate,¹⁹ the House has not enacted a statutory cause of action that expressly enables it to seek judicial enforcement of its subpoenas. This has left thorny jurisdictional issues unresolved, leaving courts greater room to decline to intervene.²⁰ And finally, seeking judicial intervention in disputes with the Executive Branch renders Congress vulnerable to courts ruling against Congress's institutional interests and expanding judicial power at the expense of Congress. In essence, resorting to civil enforcement actions leaves the delineation and protection of congressional interests to another branch of government when Congress is better suited and constitutionally empowered to vindicate itself.²¹

The Supreme Court's decision in *Trump v. Mazars USA, LLP* demonstrates these pitfalls.²² Although the court affirmed "Congress's important interests in obtaining information through appropriate inquiries," it established a new, four-factor test for assessing the validity of congressional subpoenas.²³ This ensured additional rounds of judicial review in that and future lawsuits, provided the Executive Branch with a new defense when contesting legislative subpoenas, and increased Congress's dependence on the courts to effectuate its powers.²⁴

A. Judicial Enforcement: Strengthening Civil Actions

Congress's current, and novel, default method of subpoena enforcement is civil litigation. In the wake of the collapse of its two other longtime enforcement methods—congressional enforcement through inherent contempt and Executive Branch enforcement through statutory contempt—Congress has turned to the third branch: the judiciary.

Congressional lawsuits have encountered several major obstacles. These include the slow pace of litigation, which allows noncompliant individuals to run out the investigative clock; the House's failure to enact an express cause of action empowering it to clearly seek judicial enforcement of its subpoenas; and the now well-evidenced possibility that federal courts will rule in ways that undermine Congress's institutional interests and diminish congressional power. Although the first two obstacles may be addressed through legislation, the third is a much more difficult nut to

¹⁹ 28 U.S.C. § 1365.

²⁰ See, e.g., *Committee on Judiciary v. McGahn*, 973 F.3d 121 (D.C. Cir. 2020).

²¹ See generally Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 Geo. L. Rev. (forthcoming) (2021), <https://tinyurl.com/3v3j87j5>; Molly Reynolds & Margaret Taylor, *The Consequences of Recent Court Decisions for Congress*, Lawfare (Oct. 5, 2020), <https://tinyurl.com/vtd3epk5> (describing *Mazars* as "a mixed bag for Congress" that "set[] a new—and much higher—standard for establishing the legitimacy of congressional investigations generally").

²² 140 S. Ct. 2019 (2020).

²³ See *Mazars*, 140 S. Ct. at 2036 (setting out four factors for courts to consider when evaluating separation-of-powers issues implicated by congressional subpoenas).

²⁴ E.g., Letter from Ryan M. Kaldahl, Acting Assistant Sec'y of State, Bureau of Leg. Affs., to Hon. Eliot Engel, Chairman, H. Comm. on Foreign Affs. (Aug. 7, 2020), <https://tinyurl.com/5xbh3xxb> (citing *Mazars* twice to dispute validity of House subpoena).

crack, and should generally caution against the overreliance on judicial intervention to vindicate legislative authority.

As several cosponsors on the Select Committee already know, the Protecting Our Democracy Act includes provisions to expedite the consideration of congressional subpoenas and create an express cause of action for their enforcement.²⁵ The expedited procedure outlined in the bill requires an enforcement suit to be heard by a three-judge panel convened at the request of Congress; the suit would be reviewable only by direct appeal to the Supreme Court.²⁶ Protect Democracy urges the Members of the Select Committee to support the enactment of these measures.

While Congress should work to expand and sharpen its enforcement toolkit broadly, including correcting for the deficiencies of civil litigation where possible, it should also be acutely aware of each tool's practical limits. For example, expediting consideration of civil actions may in practice have a limited effect on quickening the pace of litigation, as disputes involving complex (and often necessarily voluminous) requests for information and an array of privilege claims take considerable time to parse. In *Committee on Oversight and Government Reform v. Holder*, even when a court mandated compliance with the underlying subpoena and the “Justice Department finally disgorged more than 10,000 documents originally withheld, totaling more than 64,000 pages,” it “took a special master over a year to pore through and address” the relevant privilege claims before the documents could be delivered to the committee.²⁷

Congress also assumes considerable risks in seeking judicial enforcement of its subpoenas, namely precedential case law that diminishes congressional power. Indeed, in no case to date in which a chamber of Congress has brought suit against the Executive Branch in order to enforce a subpoena has the Judiciary unambiguously sided with Congress.

For example, the 2016 ruling that eventually mandated compliance in the “Fast and Furious” case also, and for the first time, validated the Executive Branch’s underlying privilege claims

²⁵ Protecting Our Democracy Act, H.R. 5314, 117th Cong., tit. IV, § 403. The Protecting Our Democracy Act also reinvigorates Congress’s ability to extract both information and policy concessions from the Executive Branch through the constitutional power of the purse. This once robust oversight tool has diminished in our current era of omnibus appropriations and badly needs modernizing. See Molly Reynolds, *Improving Congressional Capacity to Address Problems and Oversee the Executive Branch*, Brookings Inst. (Dec. 4, 2019), <https://tinyurl.com/ytyxkywc>; Ella Nilsen & Li Zhou, *The Government Is Headed to a Partial Shutdown After the Senate Rejected Trump’s \$5 Billion in Border Wall Funding*, Vox (Dec. 21, 2018), <https://tinyurl.com/sv7akkt2>; Andrew Restuccia et al., *Longest Shutdown in History Ends After Trump Relents on Wall*, Politico (Jan. 25, 2019), <https://tinyurl.com/w3vn558v> (shutdown ends on day 35).

²⁶ *Id.* § 403(b).

²⁷ Morton Rosenberg, *Why Enacting H.R. 4010, the Congressional Subpoena Compliance and Enforcement Act of 2017, Is a Big Mistake*, LegBranch (Jan. 9, 2018), <https://tinyurl.com/2xc339j6>.

as having a constitutional foundation.²⁸ As the Congressional Research Service concluded, despite the technical (albeit delayed) victory for Congress, “the court’s reasoning may affect Congress’s ability to obtain similar documents from the executive branch” in the future.²⁹ As Senator Chuck Grassley reflected, the ruling may have been a victory for the House in practice, but it gave the Executive Branch “a victory on the principle.”³⁰

B. Congressional Enforcement: Modernizing Inherent Contempt

Congress’s past efforts to outsource enforcement of its subpoenas demonstrates the pressing need for crafting an effective way for the legislature to vindicate its interests on its own. To improve Congress’s ability to take effective action unilaterally, Congress should consider modernizing enforcement of its inherent contempt power. It could do so by replacing the practice of deploying the sergeant-at-arms to arrest contemnors with levying fines against them.

The Congressional Inherent Contempt Power Resolution, reintroduced last May, is one proposal to that effect. This reform, which amends House Rule XI, would impose a schedule of monetary penalties on an official whom the House has held in contempt and who has authority to effect compliance with the subpoena at issue.³¹ To give bite to this proposal, the House would have to establish a mechanism to implement it, such as directing the sergeant-at-arms or Office of General Counsel to employ collection agencies if contemnors fail to pay the sum they have been fined. But because the authority to levy penalties derives from a power inherent to Congress, establishing such a mechanism would require a change only to House Rules, not new legislation.

The threat of monetary penalties and a clear mechanism for collecting them could establish a material incentive among senior executive officials to negotiate with Congress and cooperate with requests in good faith. Protect Democracy has joined with numerous organizations across the ideological spectrum to support this enforcement option.³²

To minimize the likelihood of partisan abuse of this enforcement mechanism, the House could specify that only senior officials may be fined if held in contempt. In addition, Congress could provide an express cause of action to allow contemnors to challenge in court the validity of the congressional demands at issue in a subpoena, ensuring that a clear remedy exists if lawmakers misuse this tool.

²⁸ *Committee on Oversight & Gov’t Reform v. Lynch*, 156 F. Supp. 3d 101 (D.D.C. 2016).

²⁹ Garvey, Cong. Rsch. Serv., *supra*, at 9.

³⁰ *Hearing on Operation Fast and Furious: Obstruction of Congress by the Department of Justice Before the H. Comm. on Oversight and Gov’t Reform*, 115th Cong. (2017) (statement of Sen. Chuck Grassley, Chairman, S. Comm. on the Judiciary, at 9-10), <https://tinyurl.com/3cd57n3r>.

³¹ H. Res. 406, 117th Cong. (2021).

³² *Bipartisan Coalition Letter Urging Congress to Include Inherent Contempt Fines Provision in House Rules Package*, Good Gov’t Now (Oct. 22, 2020), <https://tinyurl.com/njk7prwj>.

Although untested, this modernization of Congress’s inherent contempt power would likely pass constitutional muster. The Supreme Court has upheld Congress’s authority to enforce its contempt power on a number of occasions.³³ Whether Congress may impose fines to effectuate that authority is less certain, as it never has attempted to do so. But support for that proposition may be found in dicta.³⁴ For instance, in *Jurney v. MacCraken*, the Supreme Court stated that Congress’s inherent contempt power “is governed by the same principles as the power of the judiciary to punish for contempt,”³⁵ which includes the ability to levy fines. Indeed, the judicial branch has long emphasized the importance of self-enforcement in this area. The Supreme Court has asserted that “[c]ourts cannot be at the mercy of another Branch in deciding whether [contempt] proceedings should be initiated; rather, it is “essential” that “the Judiciary has a means to vindicate its own authority without complete dependence on other Branches.”³⁶

Of course, modernizing only Congress’s inherent contempt power would likely be an insufficient step toward increasing Executive Branch compliance with congressional subpoenas. Monetary enforcement alone may fail to secure cooperation, as fines levied on a wealthy official may not impose sufficient costs to change behavior. However, adopting the Congressional Inherent Contempt Power Resolution would provide the legislature with an additional and meaningful tool to vindicate its own oversight authority. And it would send a powerful signal that Congress is committed to drawing on its own powers to defend its institutional prerogatives.

C. Executive Enforcement: Modernizing Statutory Contempt

Amending the statute criminalizing contempt of Congress may make congressional contempt referrals a better complement to the legislature’s inherent contempt authority. Although the House has held seven current and former Executive Branch officials in criminal contempt of Congress since 2008,³⁷ the Justice Department has determined in six of those instances not to bring the matter before a grand jury,³⁸ in contravention of the statute’s plain language and intent.

³³ See *Anderson*, 19 U.S. at 230-31 (determining enforcement of contempt power to be a matter of “self-preservation” for the House); *McGrain*, 273 U.S. at 174 (“[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.”); *Jurney v. MacCraken*, 294 U.S. 125, 148-49 (1935) (Congress may punish acts “of a nature to obstruct the performance of the duties of the Legislature.”); Cong. Rsch. Serv., *Congress’s Contempt Power and the Enforcement of Congressional Subpoenas*, *supra*, at 10-11; *Inherent Contempt Fines Rules*, Good Gov’t Now, <https://tinyurl.com/2zwjdsda> (“The Supreme Court has sustained the constitutional validity and necessity of inherent contempt as a self-protective institutional mechanism at least four times between 1821 and 1935.”).

³⁴ Cong. Rsch. Serv., *Congress’s Contempt Power and the Enforcement of Congressional Subpoenas*, *supra*, at 12.

³⁵ *Jurney*, 294 U.S. at 127.

³⁶ *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 796 (1987).

³⁷ H. Res. 979, 110th Cong. (2008) (former White House Counsel Miers and White House Chief of Staff Joshua Bolten); H. Res. 711, 112th Cong. (2012) (Attorney General Holder); H. Res. 574, 113th Cong. (2014) (former Internal Revenue Service official Lois Lerner); H. Res. 497, 116th Cong. (2019) (Attorney General Barr and Commerce Secretary Ross); H. Res. 730, 117th Cong. (2021) (Steve Bannon, former adviser to President Trump).

³⁸ In the seventh case, that of Steve Bannon, the Justice Department is still weighing whether to prosecute. Sadie Gurman & Andrew Restuccia, *Steve Bannon Case Poses Test for Merrick Garland After Biden Weighs In*, Wall St. J. (Oct. 20, 2021), <https://tinyurl.com/4ew6n7bc>.

Congress therefore requires a mechanism to ensure the law is faithfully executed, even when the contemnor is an executive official.

The Congressional Research Service has summarized proposals previously introduced in Congress that would statutorily amend the criminal contempt process to establish a procedure for referring citations concerning executive officials to an independent counsel.³⁹ The Select Committee should consider these proposals as part of a comprehensive effort to sharpen Congress's subpoena enforcement tools.

For example, under these proposals, updated statutory language would allow an independent counsel to make litigation and enforcement decisions pursuant to 2 U.S.C. §§ 192, 194, which outline the criminal contempt of Congress process. Shifting enforcement decisions to an independent attorney significantly more insulated from political pressure would address the longstanding problem of U.S. attorneys facing "subtle and direct pressure" when the contemnor is an executive official.⁴⁰ The independent counsel would, of course, retain prosecutorial discretion and could elect not to pursue charges against executive contemnors if those charges were purely partisan in nature, thereby limiting the potential abuse of that tool.

Several options have been proposed for determining the independent counsel's selection, including a congressional request of appointment from a three-judge panel. This was the model prescribed in the now-lapsed post-Watergate Independent Counsel Act,⁴¹ which the Supreme Court upheld in *Morrison v. Olson*.⁴² It is worth noting that the Independent Counsel Act faced valid bipartisan criticisms for which Congress would have to account if it provides for an independent counsel's enforcement of contempt citations against executive officials. Chief among those concerns was that the independent counsel's jurisdiction was too broad.⁴³ Congress could address this concern by narrowly tailoring new statutory language to limit the independent counsel's remit only to the investigation and prosecution of contempt and efforts to obstruct that work. And as with the ICA,⁴⁴ Congress could subject the independent counsel to the Attorney General's supervision and for-cause removal, subject to judicial review. As the Congressional Research Service has counseled, "it would seem prudent to mirror the Independent Counsel framework approved in *Morrison*, subject to some potential adjustments."⁴⁵

³⁹ Garvey, Cong. Rsch. Serv., *Congressional Subpoenas: Enforcing Executive Branch Compliance*, *supra*, at 36-39.

⁴⁰ *Prosecution of Contempt of Congress: Hearing Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary*, 98th Cong. 30 (1983) (statement of Stanley F. Brand, former Counsel to the Clerk of the House of Representatives).

⁴¹ 28 U.S.C. § 591 et seq.

⁴² 487 U.S. 654 (1988).

⁴³ *E.g.*, 149 Cong. Rec. S12160, 12162 (2004) (statement of Sen. Schumer) (asserting that "the independent counsel law expired because people were worried about" a "runaway counsel").

⁴⁴ 28 U.S.C. § 596.

⁴⁵ Garvey, Cong. Rsch. Serv., *Congressional Subpoenas: Enforcing Executive Branch Compliance*, *supra*, at 38.

However, this Committee should also be aware that any of these proposals may, today, be unlikely to withstand scrutiny by the Supreme Court, at least as currently composed. In particular, many commentators have observed that should *Morrison* be challenged today, the high court would be unlikely to come to its defense. Indeed, after many decades of both executive and judicial branch trimming of congressional authority, particularly on matters of congressional oversight, there appears to be a pressing need for Congress to devise a method for more clearly and forcefully articulating its constitutional prerogatives and responsibilities.

2. Establishing a Congressional Office of Legal Counsel

To aid Congress's ability to assert and vindicate its institutional interests, the Select Committee should move forward with its recommendation that GAO examine the "feasibility and effectiveness" of a Congressional Office of Legal Counsel.⁴⁶ Such an office could provide a useful counterweight to the Justice Department's OLC, which has issued the opinions supporting the Executive Branch's noncompliance with certain legislative requests for documents and testimony and the Justice Department's refusal to prosecute certain executive officials for criminal contempt of Congress. Although this subject undoubtedly is worthy of further study, as it has been the subject of limited scholarly inquiry, the creation of a Congressional Office of Legal Counsel likely would present a number of constitutional and practical issues. I outline some of these below.

Congress has weighed whether to establish a Congressional Office of Legal Counsel on several prior occasions, including during extensive deliberations in the 1970s.⁴⁷ Although the Senate supported one such proposal and sought to include it in the Ethics in Government Act of 1978, the House rejected the idea,⁴⁸ fearing the joint office "would not reflect House preferences on matters that divided the two chambers."⁴⁹ In lieu of a joint Office of the Congressional Legal Counsel, the Senate created an Office of the Senate Legal Counsel to assert and defend its interests in court, establishing this office and an express cause of action to enforce Senate subpoenas via the Ethics in Government Act.⁵⁰ The House did not establish its Office of General Counsel until 1992; it incorporated the Office into House Rules in 1993.⁵¹ These House and Senate offices represent the institutional interests of their respective chambers to this day. However, the narrow jurisdiction of those offices has left the legislative branch without a single entity to champion its overarching institutional interests and opine on the scope of critical

⁴⁶ H. Rep. No. 116-562, at 215, 232 (2020), <https://tinyurl.com/2mcejhz3>.

⁴⁷ S. Rep. No. 95-170, at 18-20 (outlining history).

⁴⁸ 124 *Cong. Rec.* 35,672 (1978).

⁴⁹ Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 *Cornell L. Rev.* 571, 612 (2014). The Congressional Research Service also has stated that the House rejected the joint office because it "perceived the House and Senate to have somewhat different legal concerns." Cong. Rsch. Serv., RS22891, *Office of Senate Legal Counsel* 1 (2014), <https://tinyurl.com/y34kb6>.

⁵⁰ Ethics in Government Act of 1978, Pub. L. No. 95-21, §§ 701-15, 92 Stat. 1824, 1875-85 (1978); 2 U.S.C. § 288; Pub. L. No. 95-21, § 705(f)(1), 92 Stat. at 1879 (cause of action); 28 U.S.C. § 1365 (cause of action).

⁵¹ H. Res. 423, 102d Cong. (1992); Rules of House of Reps., 103d Cong., Rule II(8).

legislative authorities. The accretion over the years of OLC opinions that narrowly construe Congress's powers and offer expansive interpretations of executive authority evince the need for a single congressional office capable of responding forcefully in kind.

As Congress examines whether to establish and how to structure such an office, it should keep several things in mind. First, the Executive Branch has lodged a number of objections to earlier legislative proposals to create a Congressional Office of Legal Counsel. One proposal, outlined in the Separation of Powers Revitalization Act of 1975, would have created an office with the power to defend and prosecute, and to intervene or appear as amicus in, certain civil suits implicating the institutional interests of Congress.⁵² The Congressional Legal Counsel created in the bill would have been jointly appointed by the President Pro Tempore of the Senate and the Speaker of the House, pending the approval of the full House and Senate in a concurrent resolution.⁵³

OLC identified “substantial constitutional infirmities” in that proposal.⁵⁴ First, it contended that the appointment of the Congressional Legal Counsel must be subject to the Article II, Section 2, Clause 2 of the Constitution because the Constitution provides no alternative process “for the appointment of officers serving Congress as such rather than its components.”⁵⁵ The opinion notes that other joint congressional officers—including the Comptroller General (the head of GAO), the Librarian of Congress, and the Public Printer (known now as the Director of the Government Publishing Office)—are appointed precisely in this manner.⁵⁶ OLC added that because the Counsel would be subject to appointment by the President, she also would be subject to the President's removal.⁵⁷

Second, OLC cast doubt on whether a single office should represent the interests of legislative chambers designed by the framers to be separate. The opinion quotes James Madison,⁵⁸ who argued:

“In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their

⁵² S. 2731, 94th Cong. (1975).

⁵³ *Id.*

⁵⁴ Constitutionality of Bill Creating an Off. of Cong. Legal Counsel, # Op. O.L.C. 384, 392 (1976), <https://www.justice.gov/file/20871/download>.

⁵⁵ *Id.* at 387-88 (stating “Article I, Sections 2 and 3 of the Constitution provide that the House... and the Senate choose their respective officers,” but not joint officers).

⁵⁶ *Id.* at 389; 31 U.S.C. § 703 (Comptroller General); 2 U.S.C. § 136-1 (Librarian of Congress); 44 U.S.C. § 301 (Director of Government Publishing Office); 2 U.S.C. § 1801 (Architect of the Capitol).

⁵⁷ Constitutionality of Bill Creating an Office of Congressional Legal Counsel, # Op. O.L.C. at 390.

⁵⁸ *Id.* at 388.

common functions and common dependence will admit.... [T]he weight of the legislative authority requires that it should be thus divided....⁵⁹

In short, OLC suggested that an Office of Congressional Legal Counsel may contravene the framers' intent to fragment legislative power by creating a bicameral body.

Despite these objections, history shows that it is possible to get executive signoff on a Congressional Office of Legal Counsel. The Senate managed to do so in 1978, after modifying its proposal "in certain aspects to meet all objections raised by the [Justice] Department."⁶⁰ A detailed description of the resulting office (which the House ultimately refused to support) and its proposed legal authorities can be found in Senate Report 95-170 (1978).⁶¹

The Select Committee should, however, take note of an additional concern. Although lawmakers might intend a Congressional Office of Legal Counsel to represent the institutional interests of the entire legislative branch, it may, in practice, end up highlighting the branch's acute internal divisions over key legal and constitutional questions.⁶² For instance, it seems not only possible but likely that the Office of Senate Legal Counsel or the House Office of General Counsel may contest opinions issued or positions taken by a Congressional Office of Legal Counsel where those offices' views of their chambers' institutional interests differ. Given such contestation—which likely would arise during the thorniest of legal, constitutional, and political disputes—it is difficult to ascertain whether a court would consider Congress's institutional interests meaningfully clarified by the Congressional Office of Legal Counsel.

⁵⁹ The Federalist No. 51 (James Madison).

⁶⁰ S. Rep. No. 95-170, at 8.

⁶¹ *Id.* at 82-108; *see also id.* at 8-18 (need for the office), 18-21 (past congressional concern regarding the office).

⁶² Internal disputes over Congress's institutional interests are quite common. For instance, the Speaker of the House, represented by the House Office of General Counsel, and a large portion of the House Republican caucus are engaged in an ongoing dispute over the constitutionality of the House's proxy voting system. Pet. for Writ of Cert., *McCarthy v. Pelosi*, No. 21-395 (U.S. Sept. 9, 2021). Though courts have dismissed House Republicans' lawsuit on the ground that the Constitution's Speech or Debate Clause bars consideration of the suit, *McCarthy v. Pelosi*, 5 F.4th 34 (D.C. Cir. 2021), the merits issue at the heart of the case is whether the House may change its rules to adapt to a crisis. *See, e.g.*, Br. for Appellees at 1-2, *McCarthy*, No. 20-5240 (D.C. Cir. Sept. 30, 2020) ("This process permits the House to conduct vital business during the crisis and promotes bedrock principles of representative government."). To preserve maximum discretion for the House, the House General Counsel has sought to vindicate "the House's authority 'to determine the Rules of its Proceedings.'" *See id.* at 2. House Republicans, on the other hand, have sought judicial intervention to block the exercise of that authority and establish that courts may second-guess Congress's rulemaking authority to an unprecedented degree. *Cf. United States v. Ballin*, 144 U.S. 1, 5 (1892) (allowing for judicial review of congressional rules only where they "ignore constitutional restraints or violate fundamental rights," or bear no "reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained"). It follows that just as House Republicans have contested the House General Counsel's view of the chamber's institutional interests and authority, so too may the House Office of General Counsel or the Office of the Senate Legal Counsel dispute a Congressional Office of Legal Counsel's conclusion.

These questions, the relevant legislative history, and the Justice Department’s objections to the office are worth GAO’s close study, in accordance with the Select Committee’s recommendation at the close of the 116th Congress.

3. Security Clearances for Congressional Staff

Although executive refusals to comply with legislative subpoenas offer the highest profile examples of the challenges Congress faces in securing the information it needs to conduct oversight, lawmakers face a second (self-imposed) challenge: strict limitations on the number of congressional staff with access to high-level security clearances.

Both chambers restrict who may receive security clearances and the level of clearance particular staff may receive. In the House, each member may have no more than two cleared staff in their personal office; those individuals may receive only a Top Secret (TS) clearance and therefore cannot access Sensitive Compartmented Information (SCI).⁶³ Senators are subject to identical restrictions on personal staff clearances, unless they sit on the Armed Services, Foreign Relations, or Homeland Security and Governmental Affairs Committees, or on the Appropriations Subcommittees on Defense or State, Foreign Operations, and Related Programs.⁶⁴ Senators on those panels may employ an additional cleared staffer to assist with their committee work.⁶⁵ Although committee staff in both chambers may, at the request of committee leadership, receive approval for a TS/SCI clearance,⁶⁶ lawmakers on the Senate Select Committee on Intelligence (SSCI) enjoy a notable staffing advantage over their House counterparts. Each SSCI member is afforded a “staff designee,” who is hired by, and serves at the individual direction of, the member; may receive a TS/SCI clearance; and is paid by SSCI to assist the member’s committee work.⁶⁷

Members of the House Permanent Select Committee on Intelligence (HPSCI) have decried that they cannot also hire a personal, TS/SCI-cleared “staff designee”—emphasizing the “onerous burden” the lack of such staffers places on members, who “are unable to have the assistance of staff at the most crucial times.”⁶⁸ Former Rep. Susan Davis, who sat on the House Armed

⁶³ Mandy Smithberger & Daniel Schuman, Proj. on Gov’t Oversight, *A Primer on Congressional Staff Clearances* (Feb. 7, 2020), <https://www.pogo.org/report/2020/02/a-primer-on-congressional-staff-clearances/>; Mandy Smithberger, Proj. on Gov’t Oversight, *Testimony Before the House Appropriations Committee’s Legislative Branch Subcommittee 1* (Apr. 2, 2019), <https://tinyurl.com/hzxatx5z>; Rep. Susan Davis, *Written Testimony for the House Committee on Appropriations Subcommittee on the Legislative Branch* (Apr. 2, 2019), <https://tinyurl.com/42w3f92c>.

⁶⁴ Smithberger & Schuman, *supra*.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ S. Res. 445, 108th Cong. § 201(g) (2004); Daniel Schuman, *Schiff’s First Order of Business for the House Intelligence Committee*, Just Security (Jan. 29, 2019), <https://tinyurl.com/2d5skbae>; Phillip Lohaus et al., *Improving Congress’s Oversight of the Intelligence Community*, The Hill (Jan. 24, 2017), <https://tinyurl.com/k5are3th>.

⁶⁸ Letter from Eight Members of Cong. to Hon. Tom Graves, Chairman, Subcomm. on Legis. Branch, H. Comm. on Appropriations, and Hon. Debbie Wasserman Schultz, Ranking Member, Subcomm. on Legis. Branch, H. Comm. on Appropriations (Mar. 22, 2016), https://irp.fas.org/congress/2016_cr/hpsci-hac.pdf; Gopal Ratnam, *Staff Security*

Services Committee, similarly attested that the highly classified nature of certain aspects of committee work and the tight restrictions on access to TS/SCI clearances meant that “there are times when I cannot rely on... my personal office staff” to “conduct research for me... and act as a sounding board.”⁶⁹ Davis suggested that this undermined her ability to meet “the obligation to keep abreast” of relevant issues.⁷⁰

In short, the limited staff support lawmakers have at their disposal when dealing with highly classified information severely impedes their capacity to conduct effective oversight of executive defense and national security programs. Unlike lawmakers on other panels, members of congressional national security committees are less able to lean on support from journalists or civil society groups in their efforts to uncover misconduct or oversee the agencies in their jurisdiction. As Rep. Adam Schiff, then the ranking member of HPSCI, explained in 2017: “[B]ecause of the classified nature of the [Intelligence Community], we cannot rely on outside interest groups to raise issues to our attention as other Committees can. We have to find them ourselves—often from agencies very good at keeping secrets.”⁷¹ This underscores the need for members to have personal staff cleared at a level that allows them to undertake the most consequential, and therefore highly classified, oversight work.

To address this issue, the Select Committee should consider reforms aimed at increasing the number of congressional staff with TS/SCI clearances. At a minimum, the Select Committee should support a proposal to provide HPSCI members—like their SSCI counterparts—with “staff designees,” cleared at the TS/SCI level, to support individual members’ committee work.⁷² It appears that all the House must do to make this change is pass a resolution, as the Senate did before it.⁷³

Although this modest adjustment would put intelligence oversight in the House and Senate on similar footing, it would make little dent in the broader lack of lawmaker access to personal staff cleared at the TS/SCI level. Congress could take several further steps to address this problem. It could permit members serving on committees handling defense and national security matters to “designate one staffer at the TS/SCI level,” as Rep. Davis has proposed.⁷⁴ But it also could allow every member of Congress, regardless of their committee assignments, the option to designate

Clearances May Vex House Intelligence Members, Roll Call (Oct. 2, 2019), <https://tinyurl.com/ut32cub5> (“Rank-and-file members of the House Intelligence Committee, who are at the nucleus of the impeachment inquiry into President Donald Trump, likely have no personal aides to consult on the most sensitive information handled in the high-stakes probe.”).

⁶⁹ Rep. Susan Davis, *Written Testimony for the House Committee on Appropriations Subcommittee on the Legislative Branch* (Apr. 2, 2019), <https://tinyurl.com/42w3f92c>.

⁷⁰ *Id.*

⁷¹ Rep. Adam Schiff, *Statement Before the Committee on House Administration: Committee Budget Request for the 115th Congress 1* (Feb. 15, 2017), <https://tinyurl.com/5fv6vwkk>.

⁷² Letter of Eight Members of Cong., *supra*.

⁷³ *Cf.* S. Res. 445, 108th Cong. § 201(g).

⁷⁴ Davis, *supra*, at 4.

one personal staffer to be cleared at the TS/SCI level.⁷⁵ Each chamber could make these changes individually and with only minor increases in annual appropriations to the legislative branch to accommodate the costs associated with the security clearance process.⁷⁶

This recommendation compliments many of the recommendations the Select Committee made during the 116th Congress concerning staff capacity, training, and access to technologies that would streamline oversight and make it more effective.⁷⁷

Conclusion

Despite the challenges Congress faces in strengthening its oversight capacity, lawmakers have a number of options at their disposal to vindicate the legislature's clear constitutional authorities. It is critical that Congress takes swift action to enact some of these proposals, particularly those outlined in Titles IV and V of the Protecting Our Democracy Act, to ensure that the Article I branch of government reclaims its position as a meaningful check on executive power.

I look forward to answering your questions.

⁷⁵ *Id.*; Smithberger, *supra*, at 1.

⁷⁶ As a former congressional national security staffer has testified, it seems “that the cost for providing staff a TS/SCI clearance is largely borne by the CIA, and the cost of investigating and adjudicating TS/SCI clearances is around \$5,000 for someone who has never had a clearance. We do anticipate there would be some funding needed for the legislative branch to maintain records of nondisclosure agreements, store classified documents, and track individuals granted clearance, and we urge the Committee to increase funds for the Sergeant at Arms accordingly. As most of the personal office staff of the relevant committees likely already have TS clearances, providing additional access should not be burdensome.” Smithberger, *supra*, at 2-3.

⁷⁷ See Select Comm. on Modernization of Cong., *116th Congress Recommendations, supra*; H. Rep. No. 116-562, at 155-62.